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No. 97-307

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS, INC.,

Petitioner,

v.

CHROMA LIGHTING AND CHARLES VON DER AHE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* FOR THE NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI

The National Electrical Manufacturers Association ("NEMA") hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondent has refused consent.

NEMA is the largest trade association in the United States representing the interests of electrical industry manufacturers. It has 550 member companies that manufacture products used in the generation, transmission and distribution, control, and end-use of electricity.

The rules of law governing interpretation of the Robinson-Patman Act and the other antitrust laws are of vital importance to NEMA. The Ninth Circuit decision below — which holds that a defendant in a Robinson-Patman Act case may not rebut the inference of harm to competition by showing that the relevant market is vigorously competitive — conflicts with this Court's precedents and, if allowed to stand, will impair competition and frustrate important antitrust objectives.

Because of its members' significant experience complying with rules dictating how sales programs can be designed and implemented, the *amicus* brings a unique perspective to this case. As the attached brief demonstrates, decisions like the one below have created considerable confusion for companies attempting to comply with the antitrust laws, as different standards of liability now apply in different jurisdictions. If the Ninth Circuit's rule in this case is allowed to stand, electrical industry manufacturers will be forced to tailor their sales programs depending on the jurisdiction, and to follow a standard of liability, in the Ninth Circuit and elsewhere, that affirmatively inhibits legitimate price competition.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petition for certiorari.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

The National Electrical Manufacturers Association ("NEMA") is the largest trade association in the United States representing the interests of electroindustry manufacturers. Founded in 1926 and headquartered in Rosslyn, Virginia, its 550 member companies manufacture products used in the generation, transmission and distribution, control, and end-use of electricity. Annual shipments of these products total over $100 billion.

As an association that represents manufacturers of end-use of electricity products, NEMA has a vital interest in legal questions affecting competition in the lighting product industry, and in promoting uniform and consistent interpretation of the antitrust laws which directly affect the health of the lighting industry and the welfare of American consumers.

The legal and practical consequences of the Ninth Circuit decision are of grave concern to NEMA and its member companies. In holding that the defendant in a secondary line price discrimination case may not rebut an inference of harm to competition by showing that the relevant market is vigorously competitive, the Ninth Circuit has turned on its head the very purpose of the antitrust laws, to promote competition. NEMA seeks to provide this Court with the unique perspective of its broad-based constituency on this important federal question.

As discussed in Section III below, the decision of the Ninth Circuit in this case, unless reviewed and reversed by this Court, will have serious adverse consequences for the electrical and other manufacturing industries.

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[1] Counsel for the *amicus curiae* has provided legal services to the petitioner, a member of the National Electrical Manufacturers Association, in connection with this case, and has been compensated for those services. Counsel relied on that prior work in preparing this *amicus* brief. Apart from this, no counsel for any party had any role in authoring this brief, and no person other than the named *amicus curiae*, its members, or its counsel made any monetary contribution to its preparation and submission.

INTRODUCTION AND STATEMENT OF FACTS

This case presents a fundamental question about the nature of the competitive injury requirement necessary to establish a claim of price discrimination under the Robinson-Patman Act. By its terms, that Act prohibits price discrimination only where the discrimination may reduce "competition" in some relevant market. 15 U.S.C. § 13(a) (1988). In *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), this Court held that evidence of harm to an individual *competitor*, under certain circumstances, can support an inference of the necessary harm to *competition*. *See id.* at 50-51. This case presents the question whether a defendant may rebut that inference with evidence of vigorous marketwide competition.

A panel of the United States Court of Appeals for the Ninth Circuit (Norris, Reinhardt, and Browning, JJ.) held that the *Morton Salt* inference of competitive injury is irrebuttable. In effect, the court of appeals replaced the statutory requirement of harm to "competition" with a judge-made requirement of harm to an individual competitor. Notwithstanding this Court's recent holding that "the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition," *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 209 (1993), the Ninth Circuit reasoned that "the Robinson-Patman Act was designed specifically to protect individual competitors rather than competition in general." Pet. App. 5a. The court of appeals acknowledged a directly applicable circuit split, and it expressly declined to follow (among other cases) the District of Columbia Circuit decision in *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1144 (D.C. Cir. 1988). Pet. App. 5a.

1. As amended by the Robinson-Patman Act, Section 2(a) of the Clayton Act makes it unlawful (with qualifications not relevant here) for a seller to engage in price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who

either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a). By its terms, the Robinson-Patman Act thus covers price discrimination that may substantially lessen or prevent "competition" (or may tend to create a "monopoly") in any of three different markets: in the seller's own market (a so-called "primary-line" injury); in a downstream market where the disfavored customer competes (a so-called "secondary-line" injury); or in a further downstream market where customers of that customer compete (a so-called "third-line" injury). *See, e.g.*, F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 172-205 (1962); H. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 Fordham L. Rev. 1113, 1132-42 (1983).[2] This case involves alleged secondary-line injury. In *Morton Salt*, this Court set forth principles for establishing injury to competition in secondary-line cases. The Court held that where manufacturers "sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers," that fact alone "is sufficient to justify" a finding of the requisite "injury to competition." *See* 334 U.S. at 50-51. *Morton Salt* thus permitted two distinct inferences: first, that the existence of substantial price discrimination harms a disfavored customer; and second, that harm to an individual customer in turn harms competition in the relevant downstream market. Only the second of these inferences (referred to below as "the" *Morton Salt* inference) is at issue here.

2. Petitioner Osram Sylvania Products, Inc. manufactures various lighting products. Petitioner's competitors include large manufac-turers such as General Electric Company and Philips Corporation. Trial Transcript ("Tr.") 4039-40. Each of these manufacturers sells thousands of different lighting products to thousands of different distributors. Tr. 2953-54. Between 1987 and 1991, petitioner's lighting products accounted for only 36%

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[2] By judicial extension, the Robinson-Patman Act covers even more remote downstream markets. *See Perkins v. Standard Oil Co.*, 395 U.S. 642, 646-48 (1969).

of all such sales, both nationwide and in Southern California. Trial Exhibit ("Exh.") 5123.

Although petitioner maintains a standard wholesale price list for its various products (Tr. 2549), it offers discounts in response to specific instances of competition. For example, petitioner sometimes lowers the price offered to an individual distributor in order to meet a competitor's offer to that distributor. Tr. 2575-78. Similarly, petitioner sometimes lowers the price offered to a distributor for sales to an individual consumer, in order to allow the distributor to meet a competing offer to that consumer. Tr. 2549-64. Between 1987 and 1991, in order to meet stiff competition from large competitors, petitioner offered increasingly steep discounts for an increasing percentage of its sales. Tr. 2970-78, 2994-95, 3001-02.[3]

Between 1987 and 1991, respondent Charles Von Der Ahe was a distributor of lighting products in Southern California, first through an individual proprietorship and then through a small corporation, respondent Chroma Lighting. Von Der Ahe entered the market as a 27-year-old with no relevant experience and with an initial investment of only $33,000. Tr. 241-44, 1256-60. His business never showed any profit. Tr. 1159-62. He voluntarily ceased operations in July 1991. Tr. 654.

During that time, the relevant distribution market was fiercely competitive. In Los Angeles and Orange Counties alone, there were over 200 established distributors. Tr. 4021, 1513. Petitioner alone sold to over 100 distributors, including respondents. Tr. 2537-38, 4045-56, Exh. 5124. Most distributors, including respondents, represented many manufacturers. Tr. 4055-58. The largest distributor possessed a market share of only 10%. Exh. 4669, at 141. There were 41 new entrants, which jointly accounted for 10% of petitioner's sales. Tr. 4075-79, Exh. 5127.

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[3] During that time, the percentage of sales in which petitioner offered discounts increased from 45% to 75%. Tr. 2971-73.

3. After their business failed, respondents filed state tort claims against petitioner in a California trial court. Following removal to federal court on diversity grounds, respondents amended their complaint to add an antitrust claim for price discrimination.[4] Respondents alleged that petitioner had unlawfully given certain discounts to their competitors, and that their business had failed as a result. Pet. App. 4a. A jury found for respondents and returned a treble damages award of $3,525,000. *Id.*[5] Despite undisputed evidence of vigorous competition in the secondary-line market, the district court upheld the jury's finding of injury to competition, denied petitioner's motion for judgment as a matter of law, and entered judgment for respondents.[6]

4. The Ninth Circuit affirmed. As framed by that court, the sole question presented was "whether the inference of competitive injury that arises from a showing of harm to an individual competitor in a secondary-line price discrimination case may be overcome by a showing that competition in the relevant market remains healthy." Pet. App. 4a. In addressing that question, the court reviewed at length the conflicting opinions of the District of Columbia Circuit in *Boise Cascade*, 837 F.2d at 1143-44, which had held that the *Morton Salt* inference of harm to competition was rebuttable, and the Third Circuit in *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1532-33 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991), which had held, prior to this

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[4] The district court had jurisdiction under 28 U.S.C. §§ 1331, 1332(a)(1), and 1337(a).

[5] The award rested largely on testimony by respondent Von Der Ahe, whom the district court allowed to testify as a purported expert on antitrust damages. Mr. Von Der Ahe acknowledged that he had performed no "economic analysis" (Tr. 591), and the district court itself characterized his testimony as "a kind of mom and pop damages approach" (Tr. 587).

[6] In the district court, respondents also prevailed on two pendent state-law claims, neither of which is at issue here.

Court's decision in *Brooke Group*, that the inference of harm to competition was irrebuttable. Pet. App. 4a-5a.

Endorsing *Feeser* and rejecting *Boise Cascade*, the court of appeals held that "in a secondary-line Robinson Patman case, the *Morton Salt* inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition." Pet. App. 13a. Relying heavily on legislative history, the court reasoned that "the Robinson-Patman Act was designed specifically to protect individual competitors rather than competition in general." Pet. App. 5a. The Ninth Circuit acknowledged this Court's statement in *Brooke Group* that "by its terms, the Robinson-Patman Act condemns price discrimination only to the extent it threatens competition." 509 U.S. at 209. However, the court held that statement completely inapplicable because *Brooke Group*, on its facts, involved an alleged primary-line injury in an upstream, wholesale market. Pet. App. 13a.[7]

REASONS FOR GRANTING THE WRIT

The nature of the *Morton Salt* inference raises fundamental questions, which will affect manufacturers, distributors and consumers, about the nature of the Robinson-Patman Act itself. If the *Morton Salt* inference were irrebuttable — if harm to an individu- al competitor conclusively established harm to "competition" regardless of actual market conditions — then the competitive injury requirement would be wholly illusory, and the

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[7] The Ninth Circuit also declined to follow its own prior decision in *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984). In that case, which also involved an alleged secondary-line injury, a different Ninth Circuit panel had held that a "naked demonstration of injury to a specific competitor without more is not sufficient" to establish the competitive injury requirement. *Id.* at 548. Instead, the court held, "the test must always focus on injury to competition." *Id.* The court reasoned that "neither section 2(a) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition." *Id.*

Robinson- Patman Act would (as the Ninth Circuit held) "protect individual competitors rather than competition in general." Pet. App. 5a. On the other hand, if the inference is rebuttable, then the competitive injury requirement retains significant vitality, and while secondary-line plaintiffs might be excused from addressing market conditions as part of a case-in-chief (*see* 334 U.S. at 50), at least defendants would be able to do so as part of a defense.

Over two decades ago, Chief Judge Posner explained that "the most critical issue" under the Robinson-Patman Act is "what is to be required in the way of proof of competitive injury." R. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* 38-39 (1976). This case squarely presents that issue — a "much debated" question, H. Shniderman & B. Leverich, *Price Discrimination in Perspective* 46-47 (1987), on which the courts of appeals are now hopelessly divided. The Court should grant the petition for certiorari to resolve the circuit split and to address the foundationally important antitrust question presented.

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON THE QUESTION WHETHER A DEFENDANT MAY SEEK TO REBUT THE *MORTON SALT* INFERENCE OF HARM TO COMPETITION

As the Ninth Circuit acknowledged, "the circuits are divided" on the question presented here. Pet. App. 4a. At least four courts of appeals have held that injury to competition remains significant in secondary-line cases and, accordingly, that the *Morton Salt* inference may be rebutted. On the other hand, at least three courts of appeals have held that injury to individual competitors is paramount in secondary-line cases and, accordingly, that the *Morton Salt* inference is irrebuttable. As the Eleventh Circuit has noted, "[a] controversy has raged (and continues to rage) over the meaning of the word 'competition' as used in the so-called 'competitive injury' phrase of section 2(a)." *Alan's of Atlanta,*

Inc. v. Minolta Corp., 903 F.2d 1414, 1418 n.6 (11th Cir. 1990).[8]

In *Boise Cascade*, the District of Columbia Circuit held that the *Morton Salt* inference of competitive injury is subject to rebuttal. In that case, the court of appeals set aside a Federal Trade Commission order concluding that a dealer had benefitted from price discrimination made unlawful by Section 2(a).[9] To overcome the *Morton Salt* inference, the dealer had introduced evidence that its industry was "characterized by intense competition" (837 F.2d at 1135) and that "competition among dealers generally was healthy" (*id.* at 1143). The FTC dismissed this evidence as irrelevant, but the court of appeals disagreed. The court explained that the *Morton Salt* inference could be "overcome by evidence showing an absence of competitive injury." *Id.* at 1144 (emphasis removed). The court reasoned that the Robinson-Patman Act "is directed to the preservation of competition" and that *Morton Salt* creates "only an inference" —

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[8] Commentators repeatedly have noted this persistent judicial disagreement. *See, e.g.*, Wegenar, *9th Circuit Decision Invites High Court To Resolve Circuit Split on Rebuttability of Competitive Injury Inference Under Robinson-Patman Price Discrimination Act*, Nat'l L.J. (May 19, 1997) at B5-B6 (discussing this case); P. Larue, *Robinson-Patman Act in the Twenty-First Century: Will the Morton Salt Rule Be Retired?*, 48 S.M.U. L. Rev. 1917, 1928 ("there is some confusion among the courts, and there is a conflict among the circuits"); F. Rowe, *supra*, at 126 (noting "perennial controversy over the correct application of Section 2(a) to avert detrimental effects on *competition*, on the one hand, or on individual *competitors*, on the other").

[9] The complaint in *Boise Cascade* arose under § 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(f), which makes it unlawful for a buyer to knowingly receive a price discrimination "prohibited by" § 2(a). *Boise Cascade* squarely presented the question of secondary-line injury under § 2(a), because "buyer liability under § 2(f) is dependent on seller liability under § 2(a)." *Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69, 77 (1979).

and "manifestly does not create an irrebuttable presumption." *Id.* at 1143-44.

At least three other courts of appeals, in traditional secondary-line cases arising under § 2(a), have adopted similar holdings. In *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415 (8th Cir. 1986), the Eighth Circuit affirmed a grant of summary judgment to the defendant on the ground that the plaintiff's market "was highly competitive" and "remained so" after the pricing decisions at issue. *Id.* at 420. The court stressed that the competitive injury requirement "refers not to the effect upon competitors, but to the effect upon competition in general." *Id.*[10] In *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380 (10th Cir. 1985), the Tenth Circuit approved a jury instruction that "if a price discrimination is substantial in magnitude, you may presume such discrimination injured competition *unless you find [the defendant] has proved otherwise*." *Id.* at 394 (quotations omitted) (emphasis added). The court stressed that "'neither section 2(a) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition.'" *Id.* at 394 (citation omitted). And in *Interstate Cigar Co., Inc. v. Sterling Drug, Inc.*, 655 F.2d 29 (2d Cir. 1981), the Second Circuit affirmed the dismissal of a claim where the plaintiff had failed to prove that the discount at issue "would tend to lessen competition substantially or to create a monopoly in any line of commerce, which is an essential condition precedent to establishing such a claim." *Id.* at 31.[11]

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[10] The court further stated that "analysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business, regardless of which competitor wins or loses." 799 F.2d at 420.

[11] The practice at issue in *Interstate Cigar Co.* involved a discount offered by a manufacturer to new distributors of its products. As the court of appeals explained, that pricing strategy, although "discrimination in price" within the meaning of § 2(a), "may well have increased competition" by inducing new market entrants. *See* 655 F.2d at 31.

On the other hand, at least two courts of appeals are aligned with the Ninth Circuit. In *Feeser*, the Third Circuit held that notwithstanding "undisputed" evidence of a "highly competitive" secondary-line market (909 F.2d at 1527), injury to an individual competitor conclusively satisfied the competitive injury requirement. *Id.* at 1535. The Court reasoned that although the Sherman Act "protects competition" only, the Robinson-Patman Act "extends its protection to competitors." *Id.* Similarly, in *Alan's of Atlanta*, the Eleventh Circuit held that "an injury to competition is proved by showing an injury to competitors." 903 F.2d at 1417 n.6. The court stressed that "the legal focus of the competitive injury inquiry is on the competitor, not the consumer." *Id.*

The courts of appeals are thus deeply divided on the question whether a defendant may overcome the *Morton Salt* inference by establishing the absence of any harm to competition. As discussed below in Section III, this division is particularly troubling because it affects wholesale pricing decisions in distribution channels that typically are regional or national in scope, and thus transcend the boundaries of the individual federal judicial circuits. Accordingly, the *same* pricing decisions are now *simultaneously* governed by radically different standards of Robinson-Patman Act liability. This Court should grant certiorari to resolve the circuit split that this case directly implicates.

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *BROOKE GROUP* AND OTHER CASES

The Court also should grant certiorari because the Ninth Circuit's decision demonstrably conflicts with this Court's decisions in *Brooke Group* and in numerous other cases.

To begin with, the decision below is inconsistent with the plain terms of the Robinson-Patman Act itself and with this Court's decision in *Brooke Group*. The statute requires, as an essential element of any price discrimination claim, a showing of harm to competition. Specifically, the statute requires a showing that the price discrimination at issue may tend (i) "substantially to lessen

competition," (ii) "to create a *monopoly*," or (iii) "to injure, destroy, or prevent *competition* with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a) (emphases added). In *Brooke Group*, this Court held that the statute means exactly what it says: "[b]y its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition." *See* 509 U.S. at 209.

The Ninth Circuit attempted to distinguish *Brooke Group* as a primary-line case. The text of the Robinson-Patman Act, however, simply cannot accommodate that distinction. *Each* of the three effects clauses covers *both* primary-line and secondary-line cases, *see* 15 U.S.C. § 13(a) (third clause); *George Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245 (1929) (first two clauses), so there is no harm to "competition" clause that can possibly mean harm to competition in the primary-line context, but only harm to competitors in the secondary-line context. Moreover, in *Brooke Group* itself, this Court relied primarily on its previous decisions in *Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69 (1979), and *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953). *See* 509 U.S. at 209. Those decisions each involved *buyer* liability for alleged *secondary*-line injuries. *See Great Atlantic & Pacific Tea Co.*, 440 U.S. at 74 ("Borden had discriminated in price between A&P *and its competitors*" (emphasis added)); *Automatic Canteen Co.*, 346 U.S. at 62 ("the buyer received lower prices on like goods than other buyers, 'well knowing that it was being favored *over competing purchasers*'" (emphasis added and citation omitted)).[12]

The Ninth Circuit decision also conflicts with *Morton Salt* and its progeny. In *Morton Salt* itself, this Court held only that

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[12] As one commentator has stated, "[a]lthough the Court's statements regarding the Robinson-Patman Act's concerns with competition and consumer welfare were made in a primary line case, the statements would appear also to apply to the Act's secondary line coverage." P. Larue, *supra*, at 1923.

evidence of substantial price discrimination is "adequate to support" (334 U.S. at 47) or "sufficient to justify" (*id.* at 50) inferences of competitor and competitive injury. Nothing in that decision suggests that these inferences are irrebuttable. Indeed, subsequent decisions have clarified that the inferences are merely "established prima facie," *Falls City Indus., Inc. v. Vanco Beverage, Co.*, 460 U.S. 428, 435 (1983), and that competitive injury "may be inferred" from the predicate discrimination, *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 559 (1990). Moreover, this Court has held explicitly that the first permissible inference — that substantial price discrimination injures the disfavored customer — "may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Falls City*, 460 U.S. at 435. If that inference "may be overcome" by specific evidence, then so too may the next inference permitted by *Morton Salt* — that injury to the downstream competitor causes injury to the secondary-line market. As the District of Columbia Circuit correctly recognized, "the import of *Morton Salt*" itself is that "the inference of injury is rebuttable." *Boise Cascade*, 837 F.2d at 1144.

The Ninth Circuit decision also conflicts with numerous decisions of this Court imposing the modest requirement that all of the antitrust laws be construed harmoniously. It is axiomatic that "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws." *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 80 n.13; *see, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422, 450-51, 458-59 (1978); *Automatic Canteen Co.*, 346 U.S. at 63, 73-74; *Standard Oil v. FTC*, 340 U.S. 231, 248-50 (1951). And it is also axiomatic that "the sole aim of antitrust legislation is to protect competition." *Gordon v. New York Stock Exchange*, 422 U.S. 659, 689 (1975); *see, e.g., Atlantic Richfield Co. v. USA Petroleum, Co.*, 495 U.S. 328, 338 (1990); *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977); *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 320 (1962). By treating the Robinson-Patman Act as fundamentally different from all other antitrust statutes in its (supposed) orientation towards "individual competitors," Pet.

App. 5a, the Ninth Circuit decision also conflicts with these lines of cases.

Finally, the Ninth Circuit decision conflicts with the general principles governing the use of irrebuttable presumptions (also known as *per se* rules) in the antitrust context. To condemn a practice categorically, without consideration of actual market impacts, this Court requires that the practice almost invariably have a "pernicious effect on competition," unjustified by "*any* redeeming virtue." *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958) (emphasis added). *Per se* rules are used only sparingly. *See, e.g., Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988); *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).[13] They are clearly inappropriate here, where the practice at issue is at worst competitively ambiguous. *See, e.g.*, P. Areeda & H. Hovenkamp, III *Antitrust Law* ¶ 721, at 217 (1996) ("Persistent price discrimination frequently, but not always, *increases* output.") (emphasis added).

Against all of this authority, the Ninth Circuit seized upon a few snippets of legislative history purportedly demonstrating that the Robinson-Patman Act sought to protect individual competitors as well as competition itself. Pet. App. 5a-9a. But the legislative history cannot support that conclusion. To begin with, while the bills originally introduced in 1935 by Senator Robinson (S. 3154) and by Representative Patman (H.R. 8442) would have eliminated the competitive injury requirement for price discrimination claims, the Congress expressly refused to enact those bills. Indeed, the House Judiciary Committee repeatedly expressed its concern that unless the price discrimination at issue imposed broad impacts on interstate commerce, federal regulation would

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[13] We note that in *State Oil Co. v. Khan and Khan & Associates, Inc.*, 93 F.3d 1358 (7th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3567 (Feb. 18, 1997) (No. 96-871), this Court agreed to consider whether *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), which held that vertical maximum resale price restraints are *per se* illegal, should be overruled.

be at least arguably unconstitutional. *See, e.g., Hearings Before the House Comm. on the Judiciary on Bills To Amend the Clayton Act*, 74th Cong., 1st Sess. 144, 239 (1935). *See generally* F. Rowe, *supra*, at 12-14. Accordingly, while the Congress ultimately did enact an alternative effects clause for price discrimination claims, it explicitly retained — even in that clause — the traditional Clayton Act requirement of injury to "competition" (15 U.S.C. § 13(a)).

The pertinent legislative materials also reveal a dominant congressional concern with protecting the competitive process itself. For example, the Senate Judiciary Committee announced as its "guiding ideal":

> the preservation of *equal opportunity* to all usefully employed in the service of distribution 'comportably' with their ability and equipment to serve the producing and consuming public with *real efficiency*, and the preservation to that public of its freedom *from threat of monopoly or oppression* in obtaining its needs and disposing of its products.

S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936) (emphases added). The House Judiciary Committee stated emphatically that there was "nothing" in the Act "to penalize, shackle, or discourage efficiency, or to reward inefficiency . . . nor to limit the freedom of price movements in response to changing market conditions." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 17. And Representative Patman himself stated that "[t]he bill has the support of those who believe that *competition* is the life of trade." 80 Cong. Rec. 3447 (1936) (emphasis added).[14] Thus, the

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[14] *Accord, e.g., Hearings Before the House Comm. on the Judiciary on Bills To Amend the Clayton Act*, 74th Cong., 1st Sess. 6 (1935) (Rep. Patman) ("If chains were to get control of this country we would have a monopoly and along with that monopoly would come higher prices."); 80 Cong. Rec. 6622 (1936) (Rep. Miller) ("[T]he Clayton Act was a step forward in the suppression of practices by which monopolies and restraints are promoted. . .The present bill is merely another step in the same direction.").

statutory text plainly requires an injury to competition, and large portions of the legislative history tend to confirm that requirement. Under these circumstances, the snippets of legislative history relied upon by the Ninth Circuit cannot possibly be controlling. *See, e.g., FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960).

III. THE NINTH CIRCUIT'S DECISION WILL BROADLY AFFECT MANUFACTURERS OF ELECTRICAL AND OTHER PRODUCTS AND IMPAIR COMPETITION

The electrical products manufacturing and distribution markets are highly competitive. As evidenced in this case, manufacturers sell thousands of lighting products to numerous distributors. In the geographic area at issue in this case, Los Angeles and Orange counties, there were over 200 established distributors. Given these market conditions, manufacturers naturally must engage in vigorous price competition.

The Ninth Circuit's refusal to allow manufacturers to defend against Robison-Patman Act claims on the ground that there is vigorous competition in the relevant market will have a widespread and serious impact on the electrical products industry. In electrical products and other competitive markets, fierce competition might itself now produce antitrust liability.

A. The Ninth Circuit's Decision Will Frustrate Important Antitrust Objectives

In *Automatic Canteen Company*, this Court recognized that an overly broad construction of the prohibition against price discrimination could "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." 346 U.S. at 63. Similarly, in *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court warned that the courts "'must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up discouraging legitimate price

competition.'" *Id.* at 594 (citation omitted). That is exactly the situation here.

The Ninth Circuit decision severely constricts manufacturers' ability — even in competitive markets — to engage in legitimate price competition without fear of antitrust liability. For price discrimination claims, the decision below retains all of the draconian features of antitrust, including strict liability, treble damages and fee-shifting, but eliminates the bedrock limiting principle that these consequences are justified only where the conduct at issue harms or threatens not only an individual competitor, but also the competitive process itself. The decision thus imposes substantial unfairness on products manufacturers. Even worse, however, it also threatens competition.

Regardless of competitive conditions, manufacturers who respond flexibly to price competition (as did petitioner) now face the distinct possibility that their pricing decisions will create antitrust liability. Under *FTC v. Anheuser-Busch, Inc.*, 363 U.S. at 549, any "price difference" constitutes price discrimi- nation for purposes of the Robinson-Patman Act. And under the decision below, any (significant) price discrimination now creates an irrebuttable presumption of competitive injury. Moreover, although the Act does afford two defenses designed in theory to encourage competition, the applicability of those defenses — unlike a threshold determination whether the relevant market is competitive — is notoriously difficult to gauge accurately in advance. *See, e.g.*, P. Areeda, *Antitrust Analysis* 895 (2d ed. 1974) (cost-justification defense "is a mere illusion that traps the unwary"); Hansen, *supra*, at 1151 (meeting-competition defense "still leaves much discretion to the trier of fact"). Under these circumstances, manufacturers predictably will decline to engage in legitimate price competition, and the Robinson-Patman Act (as construed below) will affirmatively undercut the pro-competitive objectives of the various other antitrust statutes.

By contrast, the opposite rule would hardly impose onerous requirements on Robinson-Patman Act plaintiffs. Under *Boise Cascade* and comparable decisions, plaintiffs still retain the

benefit of the *Morton Salt* inference, and defendants can prevail only if *they* establish, through a traditional analysis of actual market conditions, that the specific price discrimination at issue would impose no injury to competition. Where defendants can make that showing, the absence of liability threatens none of the interests that the antitrust laws were designed to protect.

B. The Confusion Created By The Circuit Conflict Adversely Affects Competition

The conflict in the circuits, unless resolved, will itself have significant adverse effects. Manufacturers of electrical products typically operate in many jurisdictions at once. Many of their distribution programs are nationwide, and their distribution systems are becoming increasingly national in scope. The impact of the Robinson-Patman Act is felt not only when litigation is threatened or commenced, but during the sales process itself. Thus, distribution programs must be tailored to take into account prevailing interpretations of the Robinson-Patman Act.

The conflicting decisions on the issue presented in this case create a significant source of uncertainty for companies tailoring sales programs to comply with the antitrust laws. What may be permitted in the District of Columbia Circuit or the Eighth Circuit or the Tenth Circuit, would not be permitted in the Ninth Circuit or in the Third Circuit. Unless this conflict is resolved, manufacturers will have substantial difficulty in determining whether or not their sales programs and pricing decisions are in conformity with the Robinson-Patman Act.

At a minimum, manufacturers must tailor their sales practices to conform to the particular Circuit law in the area where sales occur. But even this approach may afford inadequate protection. Since many manufacturers do business all over the country, they may be subject to suit in many different jurisdictions simultaneously. The Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found." 15 U.S.C. §15(a). This language has been

interpreted to mean that a corporation can be "found" in any district where it carries on any substantial part of its business. *Thill Securities Corp. v. New York Stock Exchange*, 283 F. Supp. 239 (E.D. Wis. 1968); *see also American Football League v. National Football League*, 27 F.R.D. 264 (D. Md. 1961) ("found" generally means "doing business"). This exposure creates the possi- bility of forum shopping by disfavored buyers and may cause manufacturers to conform to the most anti-competitive interpretation of the Robinson-Patman Act, even if it is incorrect. The existing lack of uniformity, and the possibility of being targeted by disfavored buyers in various jurisdictions, thus work to make the industry less competitive.

This Court should grant the petition for certiorari to address the obviously important question presented, to resolve a steadily worsening circuit split, and to prevent the obvious anti-competitive effects of the Ninth Circuit's demonstrably erroneous judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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